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Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States*. The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards, pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector, whether the decision modifies, clarifies, or overrules the findings of prior published decisions, and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Preface

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 67 Comp. Gen. 10 (1987). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974 and Civilian Personnel Law decisions, whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

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B-231044, December 4, 1989

Appropriations/Financial Management

Obligation

■ Payments

■ ■ Estimates

■ ■ ■ Communications systems/services

Under 40 U.S.C. § 757 (1982), General Services Administration billings to the Navy only are required to approximate the cost of Federal Telecommunications System (FTS) service provided. The information provided this Office does not support a conclusion that GSA's billings were unreasonable approximations.

Appropriations/Financial Management

Obligation

■ Payments

■ ■ Termination costs

■ ■ ■ Communications systems/services

The General Services Administration (GSA) is authorized to assess Navy with direct costs associated with Navy's withdrawal from FTS. Nothing in 40 U.S.C. § 757 (1982) requires GSA to recover such costs only through rates imposed on remaining FTS users.

Matter of: GSA's Billing Navy for FTS Use and Termination Costs

This decision responds to a request submitted by Raymond A. Fontaine, Comptroller of the General Services Administration (GSA), regarding the Department of the Navy's refusal to pay GSA's billing for Navy's usage of, and transition from, the Federal Telecommunications System (FTS).¹ The total amount in dispute is \$9.25 million of which \$2.4 million is related to actual measured usage of FTS by the Navy with the remaining \$6.85 million representing termination charges assessed by GSA for Navy's withdrawal from the FTS. Navy disputes the validity of the measured usage and contests GSA's authority to assess termination charges for withdrawing from the FTS. For the reasons given below, we concur with GSA that 40 U.S.C. § 757 (1982) authorizes the charges. Nothing in Navy's submission convinces us that the amounts assessed by GSA are otherwise improper.

¹ GSA submitted its request under GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 7.3(a)(3) (TS 7-40, July 14, 1983).

Legal Authority

The FTS was established in 1961 to serve the day-to-day needs of civil agencies and to provide engineering features of value during an emergency. Initially, the FTS was funded on a reimbursed basis by GSA through the Buildings Management Fund. In 1962, Congress created the Federal Telecommunications Fund to handle FTS funding. Section 110 of the Federal Property and Administrative Services Act of 1949 (1949 Act), as added by Pub. L. No. 87-847, 76 Stat. 1117, (1964) (codified at 40 U.S.C. § 757 (1982)). As a result, specific requirements of the FTS fund, as opposed to other more general provisions of law, governed GSA operation and funding of the FTS. Effective January 1, 1987, Congress merged the Federal Telecommunications Fund and the Automatic Data Processing Fund to establish the Information Technology Fund, which assumed all liabilities, obligations and commitments of the merged funds. Section 110 of the 1949 Act, 40 U.S.C. § 757, as amended by Pub. L. No. 99-591, sec. 101(m), 100 Stat. 3341, 3341-345 (1986); Pub. L. No. 99-500, sec. 101(m), 100 Stat. 1783, 1783-345 (1986).

The Federal Telecommunications Fund established in 1962 was available without fiscal year limitation for expenses, including personal services, other costs, and the procurement by lease or purchase of equipment and operating facilities necessary for the operation of the FTS, to provide local and long distance voice, teletype, data, facsimile, and other communications services. GSA was required to credit the FTS fund with advances and reimbursements from available agency appropriations and funds for telecommunications services rendered and facilities made available thereto:

... at rates determined by the Administrator to approximate the costs thereof met by the fund (including depreciation of equipment, provision for accrued leave, and where appropriate, for terminal liability charges and for amortization of installation costs . . . which expenses may be charged to the fund and covered by advances or reimbursements from such direct appropriations) 40 U.S.C. § 757. (Italic supplied.)

Congress envisioned that the FTS fund would permit GSA to manage the FTS in a unified and businesslike manner. Under the law, GSA pays all FTS operational costs, and recovers these costs from agencies using the FTS. However, the basis of allocating FTS costs is not "actual" costs but merely "approximate" costs associated with providing agencies with FTS service. *See also* S. Rep. No. 2262, 87th Cong., 2d Sess. 1-2 (1962); H. R. Rep. No. 2164, 87th Cong., 2d Sess. 1-2 (1962).

Analysis

Measured Usage Charges

In June and July 1986, Navy asked GSA to directionalize (*i.e.*, limit to one direction) or disconnect by the beginning of fiscal year 1987, 141 of 379 FTS circuits serving 13 exclusive use Navy locations. Navy expected that this action would

reduce their quarterly FTS intercity bill by \$1.2 million. GSA advised Navy that GSA's billings for intercity billings are made one quarter in advance based on the previous quarter's usage. Thus, the decrease in Navy usage based on the removal of circuits at the beginning of fiscal year 1987 was not reflected until the billing for the third quarter of fiscal year 1987. However, the third quarter billing for fiscal year 1987 did not reflect Navy's expected savings and therefore Navy withheld \$1.2 million from its third quarter payment to GSA.

Navy has advised us that it took aggressive management actions during fiscal year 1987 to reduce FTS use. All commands were directed to take necessary action to conserve FTS resources. Navy also began to remove various commands from the FTS and to significantly cut the FTS budgets of the remaining commands. In spite of these cost-cutting measures, the GSA bills showed no appreciable decrease in costs for FTS service. Navy argues that GSA has failed to document the claimed usage or explain the lack of visible savings or credits. Accordingly, Navy considers the \$2.4 million withheld from the final GSA billings for "actual measured usage" to be more than fair and prudent considering the inaccuracy of the billing methodology used by GSA and the aggressive cost-cutting actions taken by Navy.

We are unpersuaded that Navy was warranted in withholding the \$2.4 million from the fiscal year 1987 third and fourth quarter billings. GSA based the billings on actual measured usage as determined by statistical sampling techniques.² While GSA did not provide Navy the specific documentation showing these statistical sampling computations and the actual rates applied, GSA officials advise that this information is maintained by GSA on microfilm and is available to agencies in accordance with procedures set forth in Federal Information Resources Management Regulations (FIRMR) Bulletin No. 54, paragraph 7b and g (May 7, 1987). Further explanation of the statistical sampling technique employed by GSA and cost determination also may be obtained from GSA. GSA informed Navy by letter dated June 25, 1987, and in a briefing held on September 30, 1987, the reasons the billings had not decreased in the amounts expected by Navy. GSA pointed out that there were over 40 exclusive use Navy FTS locations with an equivalent amount of Navy FTS traffic originating (billable) from GSA consolidated locations. The 13 locations selected for disconnect or directionalization comprised only a small portion of the Navy's FTS usage. Navy's projected savings of \$1.2 million each quarter by disconnecting 141 of 379 circuits serving the 13 Navy locations apparently assumed that

² In brief summary, GSA's sample of agency use of FTS is based upon an up to 20 percent vendor's sample of agency calls provided on tapes to GSA from vendors. Using the 20 percent sample, GSA then determines billings to agencies for 100 percent usage by applying a "Z" factor which includes consideration of the number of days in the quarter, the distance between caller and call station, the type of call (on or off network) and the agency calling pattern (on or off network). An overhead cost factor which includes recoverable costs that are not picked up through the 20 percent sample (for example installation costs and small scale service termination costs) is then allocated to all users based upon percentage of GSA's total bill. However, GSA does not allocate as overhead large scale termination costs, since GSA maintains that it is cost effective to identify them and more equitable to recover them from the exiting agency. Based on historical data, GSA has indicated that its billings based on the 20 percent sample has an accuracy of plus or minus 3 percent, although we have nothing before us that would validate this assertion.

all the 141 circuits are in one large group and that all the traffic was originating traffic. That was not the case. An analysis of the 141 circuits spread over 13 groups, using traffic engineering tables and assuming all the traffic was originating, indicates an actual reduction in usage would have been only three quarters of Navy's expectation. Since the circuits carried two-way traffic, the amount of originating traffic eliminated was substantially less than that.

In addition, one of the disconnected locations, the Naval Academy, had never been included in the FTS sample for billing purposes and, therefore, costs attributable to this location would not be identified and directly charged to Navy. Instead, such costs were presumably recovered indirectly from all users as part of the overhead allocation. Thus, it did not contribute to a decreased billing to the extent envisioned. GSA estimates that 10-15 percent of Navy's usage had never been billed directly to Navy. Thus, if there were errors in billings, the only ones identified worked to the benefit and not the detriment of the Navy. Furthermore, directionalization at two locations, New Orleans East and West Bank groups, was initially delayed by lack of equipment at the Navy locations. The order to directionalize these two locations was canceled with Navy concurrence in order to avoid additional costs when the Navy decided to leave the FTS system. Thus, there was no basis for attributing reductions in billings based on directionalization of these two locations.

Nonetheless, GSA's actions did have an impact on its billings to Navy. Navy's measured usage based on statistical sampling for the locations that were disconnected or directionalized decreased by 422,782 minutes during the first quarter of fiscal year 1987 while entire Navy usage was down by 862,116 minutes for the same period. Accordingly, the third quarter billing did reflect a reduction of more than \$300,000 from the previous quarter. In the second quarter Navy's measured usage for these locations decreased by an additional 283,425 minutes of usage, but the overall Navy usage decreased by only 60,324 minutes.

Navy rightfully points out that official and unofficial Navy FTS usage is indistinguishable to GSA for billing purposes. However, this does not relieve Navy of the responsibility to reimburse GSA reasonably allocated costs based upon this unofficial usage. We note that under FTS the primary responsibility for determining whether FTS calls are for official business is with the agency user. GSA has already paid the bill by the time this decision is made. Agency users are in turn responsible for recovering this amount from the persons making unofficial use of the FTS system.

Additionally, while Navy may have cut FTS budgets, there is nothing inherent in this action that assures that budget cuts will be reflected in the Navy's actual FTS usage. Further, although Navy did not realize the expected savings from its cost-cutting measures, GSA's explanation reasonably accounts for Navy's failure to realize the expected savings.

We have no basis to conclude that GSA's billings to Navy were improper since GSA billings to agencies for FTS service only are required to approximate costs incurred in providing the agencies with FTS service and nothing Navy has pre-

sented demonstrates that the GSA billings based on statistical sampling represented unreasonable approximations. B-212745, Apr. 15, 1985, and B-183734, Sept. 17, 1975.

Termination Charges

In January 1987, Navy notified GSA of its intention to completely remove all locations from the FTS by October 1, 1987. In February, GSA acknowledged Navy's decision and pointed out that costs associated with their exit from the network would not be levied against remaining users. GSA informed Navy that these costs resulted from disconnecting access lines without disrupting service to other subscribers, and from direct costs associated with carrying excess capacity during network downsizing. GSA advised the Navy that it would bill Navy the cost of removing Navy from the network, estimated at \$6.85 million over and above actual usage. Navy rejected GSA's assertion of authority to assess termination charges against it and payment of the \$6.85 million termination charge.

Navy argues that section 201-1.103(c)(3) of the FIRMR and the 1950 Statement of Areas of Understanding (SAU) permits Navy to opt in or out of GSA telecommunications services without liability for termination charges because, under the SAU, Navy did not explicitly or implicitly agree to pay such costs. Navy also argues that GSA's attempt to bill Navy termination charges is contrary to GSA's historical practice of not assessing such costs against a withdrawing agency, and may be inconsistent with the legislation authorizing the Federal Telecommunications Fund, 40 U.S.C. § 757. Navy asserts that if FTS service termination costs are recoverable at all, they must be recovered as an element of FTS service costs assessed all users of the FTS system and not as a direct charge from the agency withdrawing from the FTS system. As evidence of GSA's practice, Navy points out that GSA did not assess termination costs to disconnect the Naval Electronic Systems Engineering Activity, St. Inigoes, MD; the Naval Surface Weapons Center, Ft. Lauderdale, FL; or the Naval Avionics Center, Indianapolis, IN.

GSA first indicated its intention to assess termination charges directly on agencies withdrawing from FTS in FIRMR Bulletin No. 29 (October 15, 1985). Section 201-1.103(a) of FIRMR, 41 C.F.R. § 201-1.103(a) (1986), in effect at that time, provided that the FIRMR applied to information resources activities by federal agencies to the extent specified in the 1949 Act or in other laws.³ Also, section

³ The 1949 Act, 40 U.S.C. § 471 *et seq.* (1982), established GSA as the central agency for managing the acquisition, use, and disposition of property for executive agencies. However, section 201 of the 1949 Act authorizes the Secretary of Defense to exempt the Department of Defense from GSA's centralized procurement of utility services when in the best interest of national security unless the President directs otherwise. 40 U.S.C. § 481(a). In a letter to all executive agencies dated July 1, 1949, the President directed that agencies exempted from application of the provisions of the 1949 Act "shall insofar as practicable, procure, utilize, and dispose of property in accordance with the provisions of the [1949] Act and the regulations issued thereunder in order that the greatest overall efficiency and economy may be effected." See letter of July 1, 1950, 3 C.F.R. Comp. 1949-1953, pages 995, 996. The SAU apparently was entered into in order to clarify the responsibilities of GSA *vis-à-vis* DOD under section 201(a) of the 1949 Act, 40 U.S.C. § 481(a) and to implement the President's directives set forth in the July 1, 1950 letter.

201-1.103(c)(1) of FIRMR, 41 C.F.R. § 201-1.103(c)(1) (1986), provided that the FIRMR applied to the management, acquisition, and use of telecommunications resources by executive agencies. Finally, section 201-1.103(c)(3) of FIRMR, 41 C.F.R. § 201-1.103(c)(3) (1986), provides that:

The applicability of the telecommunications resources provisions of the FIRMR to the Department of Defense (DOD) is governed by the statement of areas of understanding between DOD and GSA (15 FR 8226, December 1, 1950).⁴

The SAU sets forth general areas of understanding concerning GSA providing communication services to DOD. The SAU sets forth the situations under which GSA is responsible for procuring or providing communications services for DOD. It also establishes the criteria for determining when DOD may provide or procure the communications services directly rather than through GSA, namely when DOD determines direct acquisition is in the interest of military operations, exercise of command and/or national security. However, nothing in the SAU expressly states that GSA will provide FTS services without charges (including termination costs) to DOD or that GSA's regulations do not apply to the FTS services GSA provides DOD under the SAU.⁵ Thus, reading section 201-1.103(c)(3), the SAU, and the President's letter of July 1, 1949, together, we conclude that in those situations where GSA exercises responsibility under the SAU for procuring or providing communications services to DOD, the FIRMR applies. While DOD may not be required to have its communications needs met through GSA, having elected to do so, it is subject to the same provisions of law controlling the terms and conditions by which GSA provides those services to other agencies. Nothing in the law authorizes, let alone requires, GSA to provide agencies FTS services without reimbursement.

While it is clear that GSA *may* include *when* appropriate terminal liability charges in the annual rates assessed by GSA for FTS services under 40 U.S.C. § 757, their inclusion is not required. However, it is also clear that GSA is to recover *all* the costs incurred in operating the FTS from the agencies receiving the FTS services.⁶ Taken together, we think it clear that in appropriate circumstances, the Administrator of GSA may recover termination costs directly from agencies initiating termination of FTS services since these are FTS operating costs which the FTS Fund must recover.

Prior to the 1985 issuance of FIRMR Bulletin No. 29, GSA had not assessed termination charges on withdrawing agencies. GSA has advised us that FIRMR

⁴ GSA has consistently included such a provision in its regulations since shortly after the FTS fund was created in 1962. See 41 C.F.R. § 101-37.102(a) (1984); 41 C.F.R. § 101-37.102(a) (1979); 41 C.F.R. § 101-35.102(a) (1965). The 1950 SAU is reprinted in the DOD FAR Supplement 70.701, 48 C.F.R. 270.701 (1987).

⁵ Exemptions from the FIRMR are set forth in FIRMR section 201-1.103(c)(4), 41 C.F.R. § 201-1.103(c)(4) (1986), which does not exempt either DOD or Navy.

⁶ The \$6.85 million assessed by GSA against Navy represents the direct costs associated with disconnecting the serving access lines without disrupting service to other users and the direct costs of carrying surplus capacity during downsizing of the network to account for traffic removed. However, even in the absence of the specific statutory reference, under the decisions of this Office, termination costs are recoverable expenses from agencies that have received reimbursable services (1) initially charged revolving funds established to operate in a business-like manner, and (2) which are required to be reimbursed costs of operation from agencies receiving the service. Compare 67 Comp. Gen. 426 (1988); 65 Comp. Gen. 795 (1986); 60 Comp. Gen. 520 (1981); 59 Comp. Gen. 515 (1984).

Bulletin No. 29 was issued, in part, as a result of the first large scale withdrawal from FTS by an agency and, in part, as a result of GSA's determination that it was more equitable and appropriate to assess the costs attributable to unscheduled withdrawal from FTS to the agencies leaving the system rather than increasing rates to the continuing users.⁷ See FIRM Bulletin No. 29, par. 7 (October 15, 1985). GSA notes that customers in the private sector are assessed disconnect charges upon their withdrawal from a vendor's telecommunications system. Although the termination costs in the case at hand are not identical to disconnect charges assessed in the private sector, they are analogous, and do represent costs associated with Navy leaving the network.

With regard to the instances cited by Navy where GSA did not assess termination costs, GSA points out that the Naval Electronic Systems Engineering Activity site had two FTS access lines disconnected in November 1987 when the rest of the Navy left FTS.⁸ Since these lines were disconnected at the same time that Navy was disconnected from the entire system, disconnect charges for these two FTS lines were included in the final termination charge against Navy.

The Naval Surface Weapons Center site had six FTS lines, two of which were disconnected in October 1982 and the remaining four of which were disconnected in June 1984. The first two lines were disconnected not as a result of an agency request for withdrawal from the system, but because GSA determined that usage was not great enough to make the lines cost-effective. To date, it has not been GSA's practice to assess termination charges for disconnects occurring as a result of GSA cost-effectiveness determinations. The remaining four lines were disconnected pursuant to a Navy request for withdrawal. However, as explained earlier, it was not GSA's practice at the time to assess termination charges against a withdrawing agency. More importantly, GSA does not assess termination costs that are negligible as was the case with the four lines. As we discussed earlier, these are allocated as overhead to agencies based on a percentage of GSA's total bill.

The Naval Avionics Center in Indianapolis, IN, had 18 lines disconnected not as a result of an agency request for withdrawal from the system, but because GSA determined that usage was not great enough to make the lines cost-effective. As explained earlier, it is not GSA's practice to assess termination charges for disconnects occurring as a result of cost-effectiveness determinations.

We find no basis to conclude that GSA is acting outside its authority or in an arbitrary or unreasonable manner in assessing Navy termination costs for with-

⁷ GSA has assessed and collected termination costs from the following agencies upon their withdrawal from FTS:
—In 1987, GSA assessed and collected from the Department of the Army \$3,012,551 for costs associated with its departure from FTS on October 1, 1987.

—In 1988, GSA assessed and collected from the Department of the Air Force \$489,900 for costs associated with its departure from FTS on December 31, 1987.

—GSA has also assessed and collected termination costs against the U.S. Postal Service and the Federal Home Loan Bank Board, among other agencies.

⁸ Navy alleges that this facility was disconnected on February 13, 1984. However, GSA has no record of a disconnect order having been received prior to Navy's total withdrawal from FTS.

drawal of the entire department from the FTS. Prior to the first large scale agency withdrawal from the FTS, there was no need for GSA to consider the question of whether to recover costs associated with large scale FTS service terminations. However, once having been confronted with the question, GSA exercised its discretion as conferred by law to identify and recover the direct costs associated with large scale terminations of FTS service to an agency.

In the situations where it is economically feasible, GSA is authorized to assess these costs directly. The law does not require that GSA recoup these costs only through rates assessed on the remaining agencies using the FTS, and to do so would thrust on agencies the burden of paying large scale costs resulting from other agencies exiting the FTS. Further, since these termination costs are not included in GSA's rate computation for usage charges, there is no potential for an agency being double billed for these costs. Finally, GSA appears to have consistently applied this policy since its adoption and offers a reasonable explanation for not recovering termination costs in certain specific situations; that is, where it is uneconomical to do so or where the disconnects result from GSA's own cost-effectiveness determinations. Consequently, we find nothing warranting Navy's refusal to pay the billed direct costs attributable to Navy's withdrawal from the FTS.

B-236346, December 5, 1989

Procurement

Noncompetitive Negotiation

■ **Industrial mobilization bases**

■ ■ **Contract awards**

■ ■ ■ **Propriety**

Protest of contracting agency's proposed award of a contract for apparel to particular source to serve industrial mobilization purposes is denied where awardee's position would thereby be strengthened and protester was reasonably considered by contracting agency to be ineligible for award given its delinquent production status on current contracts.

Matter of: Tennessee Apparel Corp.

Tennessee Apparel Corp. protests the proposed award of a contract to Sidran, Inc., for 62,796¹ men's blue dress jumpers by the Defense Personnel Support Center, DLA, under request for proposals (RFP) No. DLA100-89-R-0397. Tennessee alleges that DLA improperly directed the award to Sidran as a mobilization base producer.

We deny the protest.

¹ This quantity of jumpers represents Defense Logistics Agency's estimate for the need for this item for the 1990 fiscal year. The protester has not questioned DLA assertion that this quantity is too small to be economically split into multiple awards.

The present solicitation for the jumpers, which are part of the initial uniform issue, was issued pursuant to a justification for "other than full and open competition" through a contract directed to Sidran in order "to maintain [the] mobilization base" for the item. Specifically, the contracting officer found that the use of the mobilization base authority was necessary in order to maintain "properly balanced sources of supply" in the interest of industrial mobilization and that the quantity of jumpers to be procured was the "minimum . . . needed to maintain a mobilization base."

In the justification the contracting officer stated that there were four known past suppliers of the item, including Sidran and Tennessee, both of which have "Industrial Preparedness Planning" agreements with DLA. One of the other suppliers was currently debarred from receiving contract awards and the fourth firm was "defunct." The contracting officer also stated that Tennessee was 3 months delinquent on Tennessee's last contract for the jumpers, awarded to the company as the result of a competition in which, according to DLA, only Tennessee emerged as a "viable producer." In addition, Tennessee was considered delinquent on 3 of its other 10 contracts for military apparel, which the contracting officer also considered indicative of an "overloaded production capacity."

As to Sidran, the contracting officer noted that in April 1988, the company had received a non-competitive contract for jumpers and was expected to complete it in 1989.² After also finding that an award to Sidran at the anticipated contract price would be "fair and reasonable," DLA's contracting officer considered it to be in the "best interest of the Government" to direct the award to Sidran to "ensure continuity of production in order to meet the Government's needs, as a true viable competitive base has not been established."

Tennessee primarily argues that a directed award to Sidran will not enhance the mobilization base because Tennessee will shut down its production line for this item when its own contract expires, leaving "only one inexperienced source [Sidran] for the jumpers." Tennessee also asserts that its production capacity was not "overloaded," but that "many of the delays [which Tennessee has experienced under its 1988 jumper contract] were caused by [DLA]," principally by alleged failures to timely provide government-furnished material.

Under the Competition in Contracting Act of 1984 (CICA), military agencies have authority to conduct procurements in a manner that enables them to establish or maintain sources of supply for a particular item in the interest of the national defense (*See* 10 U.S.C. §§ 2304(b)(1)(B) and 2304(c)(3) (1988)). Agencies need not obtain full and open competition where the procurement is conducted for industrial mobilization purposes and they may use other than competitive procedures where it is necessary to award the contract to a particular source or sources. *Urdan Indus., Ltd.*, B-222421, June 17, 1986, 86-1 CPD ¶ 557. Further, decisions as to which producers of a particular item must be kept in active pro-

² There is no indication that Sidran has experienced any significant delays on the contract or that Sidran's production capacity is "overloaded" in any way.

duction in order to ensure emergency preparedness is a judgment which our Office will question only if the evidence convincingly demonstrates the agency has abused its discretion. *Propper Int'l, Inc.*, B-229888; B-229889, Mar. 22, 1988, 88-1 CPD ¶ 296. We limit our standard of review in these cases because the normal concern of maximizing competition is secondary to the needs of industrial mobilization. *Id.*

We consider that the justification does contain a sufficient rationale for directing the award to Sidran. Of the two potential sources which the agency has identified for this item, one—the protester—was experiencing delinquencies on its contract for the jumper as well as on other contracts. Although Tennessee argues that “many” of the production delays it has experienced were caused by DLA, we view this statement as effectively conceding that at least some delays were attributable to the protester. The only other viable producer, Sidran, was soon to complete its contract for the jumpers. In order to maintain continuity of supply for this basic uniform item, and to increase the sustained rate at which Sidran could produce the item, it was determined to direct the award to that firm.

Tennessee also argues that a directed award to Sidran will not ultimately enhance the industrial mobilization base because, if it is not awarded this contract, Tennessee will abandon future production of the jumpers and may not be able to continue the employment of all those skilled in the jumpers’ manufacture. In this regard, DLA notes that Tennessee currently has about 10 DLA apparel contracts, ranging from men’s dress trousers to women’s white slacks, and that the company’s work force remains active under these contracts. Of course if Tennessee decides to forego competing for any future jumper contracts that is its own decision, but we cannot fault DLA for refusing to accept at face value Tennessee’s present claim that it will do so.

Given all these circumstances and given that Sidran was soon to be finishing its jumper contract without any indication of delinquencies, we conclude that the contracting officer properly justified the award to Sidran not only to strengthen Sidran’s position as a mobilization base producer but to ensure the timely completion of the contract for this critical item.

The protest is denied.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' fees claimed by prevailing protester are allowable where hours are adequately documented and the rates and hours claimed are shown to be reasonable.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs
- ■ ■ Attorney fees
- ■ ■ ■ Amount determination

Attorneys' fees need not be allocated between sustained and denied protest issues where all of the issues raised by the protester were related to the same core protest allegation which was sustained, and there were no distinct and severable grounds of protest on which the protester did not prevail.

Procurement

Bid Protests

- GAO procedures
- ■ Preparation costs

Successful protester is entitled to recover company costs incurred in pursuing protest to the extent that such costs are sufficiently documented and are reasonable.

Procurement

Bid Protests

- GAO procedures
- ■ Protest timeliness
- ■ ■ 10-day rule
- ■ ■ ■ Reconsideration motions

Procurement

Competitive Negotiation

- Offers
- ■ Preparation costs

Claim for proposal preparation costs is disallowed where claimant was not awarded proposal preparation costs in the protest decision and did not timely request reconsideration of the costs awarded.

Matter of: Data Based Decisions, Inc.—Claim for Costs

Data Based Decisions, Inc., requests that our Office determine the amount it is entitled to recover from the Department of the Navy for proposal preparation

costs under request for proposals (RFP) No. N00123-88-R-5755, and for the costs of filing and pursuing its protest in *Data Based Decisions, Inc.*, B-232663; B-232663.2, Jan. 26, 1989, 89-1 CPD ¶ 87. We determine, as discussed below, that Data Based is entitled to recover \$60,350.45 for its costs of filing and pursuing its protest.

Data Based protested the solicitation and the award of a contract to Integrated Systems Analysts, Inc. (ISA), under the RFP for maintenance and operation of a system which enables the Navy to review the maintenance status of various ships and coordinate the repair of ships when in port. Data Based argued that the Navy had, in effect, made a sole source award to ISA, that the solicitation improperly favored ISA, and that ISA should not have been allowed to compete because of an organizational conflict of interest. We sustained Data Based's protest because we found that the Navy had conducted its procurement in a manner which favored ISA and which resulted in a sole source award to ISA. We found, however, the Navy was not required to exclude ISA from competing for award under the RFP. Accordingly, we recommended that the Navy issue a new solicitation permitting all of the known potential sources a reasonable opportunity to compete and if an offeror other than ISA was selected for award, that the Navy terminate ISA's contract for the convenience of the government. We also recommended that the agency review the personnel qualifications under the RFP to ensure that the qualifications did not improperly favor ISA and only reflected the agency's minimum needs. In addition, we found Data Based entitled to the costs of filing and pursuing its protest, including attorneys' fees.

The protester claims a total of \$79,842.64, consisting of \$64,750.72 for its costs of pursuing its protest and \$15,091.92 for proposal preparation costs. The Navy and Data Based engaged in protracted discussions regarding the amount of costs to which Data Based is entitled, and Data Based provided the Navy with various documents requested by the agency. Because the parties have been unable to reach an agreement concerning the amount of Data Based's claim, Data Based has requested that we determine the amount of its entitlement pursuant to our Bid Protest Regulations, 4 C.F.R. 21.6(e) (1989).

Attorneys' Fees

Of the \$64,750.72 claimed for the costs of filing and pursuing the protest, Data Based requests reimbursement of \$55,665.58 for 239 hours of attorneys' time and expenses. These hours were billed in accordance with the fee schedule contained in Data Based's retainer agreement with its attorneys. The hours claimed for all four attorneys are documented by monthly billing statements which identify the services performed, the dates of performance and the performing attorney, and the law partner has certified that the work billed was actually performed.

A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. *Introl Corp.*, 65 Comp. Gen. 429 (1986), 86-1 CPD ¶ 279; *Malco Plastics*, B-219886.3, Aug. 18, 1986, 86-2 CPD

¶ 193. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the pursuit of its protest. *Patio Pools of Sierra Vista, Inc.—Claim for Costs*, 68 Comp. Gen. 383 (1989), 89-1 CPD ¶ 374.

The Navy does not question the reasonableness of the attorneys' hourly rates but argues that the gross amount of time incurred by Data Based's attorneys in pursuing the protest is unreasonable. The Navy contends that the protest presented no new or novel questions of law and lacked the kind of legal complexity which would justify the expenditure of 239 hours of attorneys' time. In this regard, the Navy asserts that its attorneys spent less than 40 hours defending the agency in this protest.

We generally accept the number of attorney hours claimed, if properly documented, unless specific hours deemed to be excessive can be identified and a reasonable analysis for their rejection articulated. See *Princeton GammaTech, Inc.—Claim for Costs*, 68 Comp. Gen. 400 (1989), 89-1 CPD ¶ 401. Simply concluding that the hours are excessive is inadequate. *Id.* Here, the agency has not identified specific hours which it deems to be excessive, and from our review of the attorneys' bills we find no basis to conclude that the hours expended exceed what normally would be incurred by competent counsel in pursuing the protest. In this regard, we disagree that Data Based's protest was so "simple" that the expenditure of 239 hours of attorney time was unreasonable. Further, the amount of time allegedly spent by the agency's attorneys to defend the protest has no probative significance with regard to the hours claimed by the protester's attorney.

The Navy also argues that the attorney time is insufficiently documented because the bills do not provide sufficient specificity for the agency to object to particular hours. The statements list, by date, the service performed, the performing attorney, a brief description of the services rendered and the hours billed to the protester. The Navy argues that the bill should have been further broken down to identify the time spent on each specific task claimed for a particular day. We do not agree that the attorneys' statements were not specific enough to enable the agency to question hours claimed in pursuit of the protest. The bills provide the amount of detail and explanation ordinarily found in attorneys' billing statements. See *Meridian Corp.—Claim for Bid Protest Costs*, B-228468.3, Aug. 22, 1989, 89-2 CPD ¶ 165; *Automated Business Sys. & Servs., Inc.*, GSBGA No. 9047-C (8972-P), Apr. 29, 1988, 88-2 BCA ¶ 20,779, 1988 BPD ¶ 91. There is no basis to require the kind of breakdown by specific issue and task allocation within billable hours which the Navy insists must be provided in order to validate the attorneys' billing.

The Navy further contends that it should not be required to pay attorneys' fees in connection with Data Based's allegations of ISA's conflict of interest and the restrictiveness of the RFP's personnel qualifications. The Navy argues that since we did not sustain Data Based's protest on these issues, the agency should not be responsible for the protest costs that relate to them. In *Interface Flooring*

Sys., Inc.—Claim for Attorneys' Fees, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106, we limited the protester's recovery of protests costs to one of two issues on which it prevailed because the two issues involved were so entirely severable and distinct from each other as to constitute, in effect, two different protests. In so holding, we noted that the situation was different from those protests which raised several grounds of objection to the same award. *Id.* In the case where a protester prevails on one of a number of related issues under the same award, we have held that allocation of fees between winning and losing issues is unwarranted and attorneys' fees are not limited to time spent on the issue sustained. *Princeton Gamma-Tech, Inc.—Claim for Costs*, 68 Comp. Gen. 400, *supra*. Here, we conclude that the issues raised are not so distinct or severable as to constitute different protests, but are intertwined parts of Data Based's objection that ISA, a subcontractor on the prior contract, was improperly favored by the agency with the result that the award to ISA was tantamount to a sole source award. Under these circumstances, we do not believe that Data Based's recovery of protest costs should be limited.

We find that Data Based is entitled to recover \$50,282.50 for its attorneys' fees. In so determining, we allow Data Based all of its attorneys' hours incurred through December 31, 1988. We have disallowed the 12.5 hours of attorney time incurred after the date of our decision because these hours were not incurred in the pursuit of the protest.

Data Based also seeks recovery of \$2,870.58 for its attorneys' out-of-pocket expenses for telecopies, photocopies, messengers and delivery services, taxi fare, postage, telephone charges, lexis research and entertainment. We disallow all but \$90 of these expenses because Data Based failed to provide any evidence to show for what purposes these expenses were incurred or how they relate to the protest. The \$90 we have allowed consists of \$76 for messenger services for filing of protest documents with our Office and \$14 for taxi fare to our Office for a conference and to file the protester's comments. The burden is on the protester to submit sufficient evidence to support its claim, and the burden is not met by unsupported statements that the costs have been incurred. *Hydro Research Science, Inc.—Claim for Costs*, 68 Comp. Gen. 506 (1989), 89-1 CPD ¶ 572.

Accordingly, we find that Data Based is entitled to recover \$50,372.50 for its attorneys' fees and expenses.

Cost Of Filing And Pursuing Protest

Data Based claims an additional \$11,956.22 for the costs of pursuing its protest, which consists of \$10,520.77 for the salary of its president and \$1,435.45 for its out-of-pocket expenses. Data Based calculated that its president spent 133.75 hours in pursuing its protest. In support of its claim, Data Based has provided us with a document which lists by date a brief description of the work performed by the president and the amount of time spent.

The Navy does not question the president's hourly rate but argues that the number of hours claimed is unreasonable. The Navy also complains that Data Based has not furnished contemporaneous evidence of the president's time. Data Based states that the president does not keep a contemporaneous record of his hours, and that the document submitted to us is a reconstruction of the hours that its president spent pursuing the protest. There is no requirement that a protester produce contemporaneous records to establish its entitlement to the award of costs, and we conclude that the evidence provided by the protester is sufficiently precise to determine the reasonableness of the hours claimed for its president. See *NCR Comten, Inc.*, GSBCE No. 8229, Feb. 10, 1986, 86-2 BCA ¶ 18,822 at 94,851. The Navy argues that the president's record of his time spent in pursuing the protest appears to be a mere extraction of the attorneys' billing statements. However, we find it reasonable that for every attorney charge for a meeting or telephone conversation with Data Based's president, the president would show a corresponding entry for his time spent on this protest. Thus, the fact that the president's record of his time appears to mirror the attorneys' billing statements corroborates the documentation submitted by Data Based.

We conclude that Data Based is entitled to be reimbursed for 114.55 hours of the 133.75 hours it claims for its president's time in assisting its lawyers in the pursuit of the protest. In reviewing the president's time, we allowed those hours which were substantiated by its attorneys' billing statements and appeared reasonable. We disallowed 19.2 hours, consisting of 13.2 hours of time for conferences and telephone calls with Data Based's attorneys where the claimed hours were not substantiated by the attorneys' billing statements, and 6 hours that Data Based claimed for an employee staff meeting to discuss protest strategy, that occurred after the filing of the protest, since this time appeared to duplicate the services rendered by its counsel. Accordingly, we find that Data Based has sufficiently documented and shown to be reasonable \$9,010.50 of its president's time.

Data Based also has requested reimbursement for \$1,435.45 in out-of-pocket expenses its president incurred in pursuing the protest. These expenses consist of \$927 for airline tickets for flights the president took to participate in the protest conference and to confer with Data Based's attorneys, \$40.45 for telecopies Data Based made to its attorneys to comment on proposed protest submissions and \$468 for a charge identified as per diem. We find that Data Based is entitled to recover \$967.45 for the expenses of the airline tickets and for the telecopies as they clearly relate to the pursuit of the protest and therefore are allowable. We disallow Data Based's claim for \$468 for its president's per diem expenses because Data Based has not explained these expenses or shown how they relate to the pursuit of its protest.

Accordingly, we determine that Data Based is entitled to recover \$9,977.95 for the costs of its president in pursuing its protest.

Proposal Preparation Costs

Data Based also requests reimbursement of \$15,091.92 for 349.55 hours of Data Based employee time that Data Based claims for its proposal preparation. The Navy objects to the reimbursement of these costs on the basis that we did not award Data Based its proposal preparation costs in our decision. Data Based responds that the preparation and submission of its proposal was a necessary part of its protest effort and was required to preserve its position as a participant in the procurement.

Since we did not award Data Based its costs of proposal preparation and Data Based did not timely request that we reconsider our award of costs, we find no basis for the reimbursement of Data Based's proposal preparation costs. We also find no basis for Data Based's presumption that it was required to submit a proposal to preserve its right to protest the restrictive nature of the Navy's procurement. Furthermore, we question how Data Based could incur more than 300 hours of employee time in proposal preparation when Data Based explicitly stated in its protest submissions that Data Based's proposal was essentially another company's winning proposal from 1987, updated by Data Based merely to include the new job positions of the solicitation. Accordingly, we find that Data Based is not entitled to recover any of the costs it claims for proposal preparation.

Conclusion

Based on the foregoing, we determine that Data Based is entitled to recover total costs of \$60,350.45, consisting of \$50,372.50 for its attorneys' fees and \$9,977.95 for its other costs of filing and pursuing the protest.

B-236564, B-236564.2, December 11, 1989

Procurement

Sealed Bidding

■ Contract awards

■ ■ Propriety

Procurement

Sealed Bidding

■ Invitations for bids

■ ■ Amendments

■ ■ ■ Acknowledgment

■ ■ ■ ■ Responsiveness

Protest against proposed award of a contract to a bidder that acknowledges an amendment containing a Procurement Integrity Certificate clause but fails to complete and sign the Certificate itself is denied where bids were opened prior to December 1, 1989, but award has not been made, since the requirement for the Certificate, which implements section 27(d)(1) of the Office of Federal Procure-

ment Policy Act Amendments of 1988, has been suspended from December 1, 1989, to November 30, 1990, by section 507 of the Ethics Reform Act of 1989.

Matter of: Hampton Roads Leasing, Inc.

Hampton Roads Leasing, Inc., protests the proposed award of a contract to either Anderson Funding Group or Capital Equipment Co., Inc., under invitation for bids (IFB) No. N62470-89-B-2238, issued by the Norfolk Naval Shipyard, Portsmouth, Virginia, for the leasing of a mobile hydraulic propeller pulling crane. Hampton challenges award to either bidder on the ground that Anderson's low bid and Capital's second low bid were nonresponsive because the firms failed to provide signed and completed Procurement Integrity Certificates with their bids. Hampton also alleges that the Navy's correction of a mistake in Capital's bid was improper.

We deny the protests.

The IFB, issued on July 14, 1989, was amended three times. Amendment No. 1, also issued July 14, incorporated in the IFB the Certificate of Procurement Integrity clause, Federal Acquisition Regulation (FAR) § 52.203-8, as required by FAR § 3.104-10. This clause implements section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988 (OFPP Act), Pub. L. No. 100-679, 101 Stat. 4055, 4064 (1988), which essentially provides that an agency shall not award a contract unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the OFPP Act pertaining to the procurement. The activities prohibited by the act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information. Under FAR § 52.203-8, bidders are required to list all violations or possible violations of the act, or enter "none" if none exists, on the Procurement Integrity Certificate and sign the document.

The Navy received five bids at bid opening on August 9. Anderson was the apparent low bidder; Capital was the apparent second low bidder. Anderson acknowledged amendment No. 1 by signing the cover sheet of the amendment but did not complete or sign the Certificate of Procurement Integrity itself. Capital acknowledged receipt of amendment No. 1 and signed the certificate, but did not complete the section requiring the bidder to either list violations or possible violations of the act, or enter the word "none" if none exists. Two weeks after bid opening, Anderson submitted a signed Procurement Integrity Certificate to the Navy. The Navy proposes to award the contract to Anderson, arguing that the act and implementing regulations permit the Navy to accept a contractor's Procurement Integrity Certificate at any time before award. Hampton, the third low bidder, protests the proposed award of a contract to either Anderson or Capital.

Effective December 1, 1989, section 27 of the OFPP Act was suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1717 (1989), which provides that section 27 "shall have no force or effect during the

period beginning on the day after the date of enactment of this Act and ending one year after such day.” Accordingly, agencies are not to include the Certificate of Procurement Integrity clauses at FAR §§ 52.203-8, 52.203-9, 52.203-10 and 52.327-9 in any solicitation issued on or after December 1, 1989, through November 30, 1990. The FAR provisions affected by the suspension were changed to provide that agencies are to amend solicitations issued prior to December 1, 1989, for which bids have not been opened or proposals received before that date, to delete the Certificate provision and clauses. In the case of solicitations for which bids have been opened or offers received prior to December 1, 1989, but where award has not been made, agencies are to disregard the lack of a Certificate in determining eligibility for award and delete the Certificate clauses by administrative change. 54 Fed. Reg. 50,713 (1989).

Consistent with the FAR guidance, we find that since the statutory requirement for completion and signing of the Procurement Integrity Certificate as a condition of award has been suspended and no contract has yet been awarded in this case, the Navy may proceed with award to Anderson. In view of our finding, we need not resolve Hampton’s challenge to the correction of an alleged mistake in Capital’s second low bid.

The protests are denied.

B-237236, December 11, 1989

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Identification tags

An agency may use appropriated funds to purchase employee identification tags which, unlike calling or business cards, are not personal in nature and are reasonably necessary to the operations of the agency.

Matter of: Department of the Navy—Purchase of Employee Identification Tags

An authorized certifying officer of the Naval Telecommunications Command, Department of the Navy, asks whether the Navy may use its operations and maintenance appropriation to purchase identification tags for senior staff officials. The officer requests our opinion in light of our decisions disallowing the use of appropriated funds to purchase business or calling cards. For the following reasons, we conclude that the Navy may use appropriated funds to purchase identification tags.

Background

The Naval Telecommunications Command plans to require senior staff officials to wear identification tags. Each tag will be engraved with the command crest and identify the individual by name and rank or, if civilian, by title.

Discussion

We have long held that the costs of calling or business cards constitute personal rather than official expenses and, as such, may not be paid for with government funds in the absence of specific statutory authority to do so. 68 Comp. Gen. 467 (1989). However, an early decision of the Comptroller General distinguished the purchase of employee identification tags from the purchase of calling or business cards. 2 Comp. Gen. 429 (1923). Identification tags are not personal in nature; their use will be mandated and they will remain the property of the government. The Command has justified a determination that their use is reasonably necessary to carry on the operations of the Navy. Therefore, the Navy may use appropriated funds to purchase the employee identification tags. ¶

B-236573, December 13, 1989

Procurement

Contractor Qualification

■ Approved sources

■ ■ Alternatives

■ ■ ■ Pre-qualification

■ ■ ■ ■ Testing

Procuring agency properly rejected the protester's alternate item in a procurement involving a "Products Offered" clause where the protester refused to bear the costs of properly required qualification testing.

Matter of: Castoleum Corporation

Castoleum Corporation protests the award of a contract to Rust-Lick Products, a division of ITW Devcon Corp. under request for proposals (RFP) No. DLA400-89-R-0933, issued by the Defense General Supply Center, a field activity of the Defense Logistics Agency (DLA). Castoleum contends that its product, offered under the "Product Offered" clause of the RFP, is identical to the approved source item offered by Devcon and that DLA should have accepted Castoleum's lowerpriced offer.

We deny the protest.

The RFP, issued as an unrestricted procurement, sought the supply of Rust-Lick 606, an aircraft engine corrosion preventative. Rust-Lick was specified as the required item because General Electric, the original equipment manufacturer for

the engines, specified Rust-Lick in its maintenance procedures and the agency states that it lacked sufficient specifications or technical data to determine the acceptability of other products.

The RFP, however, did provide for the submission of alternate items. The "Products Offered" clause permitted firms to offer alternate items that were either identical to or physically, mechanically, electrically and functionally interchangeable with the Rust-Lick product. Offerors were required to furnish all of the necessary information and data to establish that the alternate product offered was equal to the Rust-Lick product and were warned that the failure to furnish information sufficient to establish the acceptability of the alternate product might preclude consideration of the offer. The clause also provided that:

... the government will make every reasonable effort to determine, prior to award, the acceptability of any products offered which are within the range of consideration. However, if such determination cannot be accomplished by the expected contract award date, the products may be considered technically unacceptable for this award.

DLA received eight offers in response to the RFP, seven of which offered an alternate item. Devcon offered its Rust-Lick 606 product while Castoleum offered to provide its Trizol 909, which Castoleum states is chemically identical to the Rust-Lick 606. Castoleum proposed price was approximately \$60,000 while Devcon's price was approximately \$70,000.

The alternate offers were submitted to DLA's engineering support activity (ESA) for evaluation. The ESA determined that approval of the alternative items would require lengthy and expensive testing that was not justified by the expected usage. On this basis, DLA rejected Castoleum's alternate offer, and this protest followed.¹

Our Office has recognized that, in appropriate circumstances, the procurement of items on a source controlled basis is permitted. *JGB Enterprises, Inc.*, B-218430, Apr. 26, 1985, 85-1 CPD ¶ 479. However, when a contracting agency restricts a contract award to an approved source, it must give nonapproved sources a reasonable opportunity to qualify. See 10 U.S.C. § 2319(c) (1988); *American BallScrew*, 66 Comp. Gen. 133 (1986), 86-2 CPD ¶ 664; *Kitco, Inc.*, B-232363, Dec. 5, 1988, 88-2 CPD ¶ 559.

Castoleum argues that DLA's refusal to test its offered product deprived Castoleum of a reasonable opportunity to qualify. The record shows that after the filing of the protest, the agency arranged with General Electric to test Castoleum's product at Castoleum's expense to ascertain that product's equivalency to Rust-Lick 606. However, Castoleum refused to pay the estimated \$5,000 for this qualification testing and contends that the agency should be required to bear the expense of qualifying alternate sources.

¹ DLA, in its agency report, contends that Castoleum failed to provide sufficient information to establish that the offered alternate item was equal to the Rust-Lick product. However, the agency does not elaborate what other information was required from Castoleum or why this information could not have been obtained from the protester through discussions. In any case, as discussed below, the ultimate reason Castoleum's product was rejected is that it refused to pay for testing of its product.

Under 10 U.S.C. § 2319 and its implementing regulations, potential offerors, in order to become qualified, generally bear the cost of testing and evaluation. *See* 10 U.S.C. § 2319(b)(3) (1988); Federal Acquisition Regulation (FAR) § 9.202(a)(1)(ii) (FAC 84-47). The law also provides that, under certain circumstances, an agency may bear the cost of qualification testing for small business concerns where the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize, within a reasonable period of time, the costs incurred by the agency, considering the duration and dollar value of anticipated future requirements. 10 U.S.C. § 2319(d)(1)(B); FAR § 9.204(a)(2).

The agency determined that the anticipated usage of the Rust-Lick product did not justify the expense of performing the qualification testing. Castoleum has not shown the agency's determination is unreasonable. Under the circumstances, we see no basis to conclude that DLA was required to bear the expense of testing Castoleum's product. Inasmuch as Castoleum refused to bear the expense of the necessary qualification testing, DLA acted reasonably in rejecting Castoleum's alternate offer and awarding a contract to Devcon, as the only approved source.

Castoleum also argues that since its offered product, Trizol 909, is chemically identical to the Rust-Lick, it is the "exact product" sought by the RFP and need not be tested.² We do not agree. The solicitation defines an "exact product" to be "the identical product cited in the AID [acquisition identification description] manufactured by the manufacturer cited in the AID or manufactured by a firm who manufactures the product for the manufacturer cited in the AID." Under this definition, Castoleum's product is not the "exact product" sought by the RFP but an alternate item. In this regard, the record indicates that even if the RustLick and Trizol were chemically similar, the Air Force and General Electric found that the two products could differ in the amount of buildup each leaves on engine parts. An increase in the amount of chemical buildup left on an engine would result in increased maintenance time and expense.

Based on the foregoing, we find that DLA acted reasonably in requiring alternate items to be tested in order to be qualified as approved sources and could reject the products of offerors who declined to pay for the testing.

The protest is denied.

² Castoleum has submitted the results of an infrared scan, performed by an independent chemical company, of its Trizol 909 and the Rust-Lick which the protester contends demonstrates that the two products are identical. The test report, however, only indicates that the two products are "similar."

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Conflicting terms

■ ■ ■ ■ Ambiguity

Where bid is submitted under name "Sigma Electronics" and bond is submitted under name "Sigma General Corporation" contracting officer properly rejected bid as nonresponsive because of uncertainty as to identity of the actual bidder and was not required to investigate further whether the named entities referred to same legal entity, since bidder bears primary responsibility for unambiguously identifying itself as the party to be bound by the bid and there was insufficient evidence in the bid documents to alert contracting officer that named entities might be the same legal entity.

Matter of: Sigma General Corporation

Sigma General Corporation protests the rejection of its bid as nonresponsive and the subsequent award of a contract to Fiber Cable, Inc., under invitation for bids (IFB) No. N62474-89-B-2536, issued by the Naval Weapons Center, for a fiber optics distribution system.

We deny the protest.

The protester submitted the apparent low bid, identifying itself as "Sigma Electronics;" however, the bid bond accompanying the bid named the principal as "Sigma General Corporation." As a result, the contracting officer rejected the protester's bid as nonresponsive on the basis that to the extent that the principal named on the bid differed from the name on the bid form, the bid bond was defective.

The protester challenges the agency's determination that its bid was nonresponsive, contending that its bid in fact was responsive because the name used in the bid documents (Sigma Electronics) and the name used in the bid bond (Sigma General Corporation) refer to the same legal entity. In this regard, the protester states that the Data Universal Numbering System (DUNS) number noted in the bid form indirectly identifies its firm as Sigma General Corporation d/b/a Sigma Electronics. Moreover, the protester claims that the Employer Identification Number (EIN) supplied in the bid form belongs only to Sigma General Corporation.

The agency correctly argues that responsiveness must be determined at the time of bid opening and, in general, solely from the face of the bid and the materials submitted with the bid. In this regard, the agency states that in determining whether Sigma's bid was responsive, the contracting officer did not investigate the DUNS number or the EIN number that Sigma furnished in its bid documents.

Generally, a bid bond which names a principal different from the nominal bidder is deficient and that defect may not be waived as a minor informality.

C.W.C. Assocs., Inc., and Chianelli Contracting Co., 68 Comp. Gen. 164 (1988), 88-2 CPD ¶ 612. Moreover, a contracting officer is not obligated to interpret an ambiguous bid, by sequential logical deductions and inferences, to make a bid responsive. *Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture*, B-208332, Jan. 19, 1983, 83-1 CPD ¶ 69.

Here, Sigma has attempted to show that the principal named in the bid bond (Sigma General Corporation) is the same entity identified in the bid (Sigma Electronics). In support of this position, Sigma has submitted several official documents: a tax document indicating that the EIN number Sigma included in its bid was assigned by the Internal Revenue Service to Sigma General Corporation; Sigma's seller's permit issued by the California State Board of Equalization to Sigma General Corporation and Sigma Electronics; and a Fictitious Business Name Statement identifying Sigma Electronics as the fictitious business name for Sigma General Corporation. Moreover, the record shows that the DUNS number Sigma included in its bid was assigned by Dunn and Bradstreet to Sigma General Corporation d/b/a Sigma Electronics.

Sigma has presented evidence to us that Sigma General Corporation and Sigma Electronics refer to the same entity. However, there was nothing in the bid submission to show this relationship. As the Navy states, a contracting officer should not be required to conduct an investigation to determine whether the different named entities, that is, the party submitting the bid and the principal listed on the bid bond, are in fact the same. Rather, we think the bidder bears the primary responsibility for properly preparing its bid documents in such a fashion that the contracting officer may accept the bid with full confidence that an enforceable contract conforming to all the requirements of the IFB will result. See *Outdoor Venture Corp.*, B-235056, June 16, 1989, 89-1 CPD ¶ 571. Under these circumstances we find no basis to object to the contracting officer's determination to reject Sigma's bid because of a defect in its bid bond.

The protest is denied.

B-231838.2, December 15, 1989

Civilian Personnel

Compensation

■ **Discrimination allegation**

■ ■ **Attorney fees**

■ ■ ■ **GAO review**

In view of the statutory authority vested in the Equal Employment Opportunity Commission (EEOC) to order final corrective action in discrimination cases, this Office declines to question the propriety of EEOC's award of attorney fees in this case.

Matter of: Owen F. Beeder—Attorney Fees—Final Order of EEOC

The issue in this case is whether the Environmental Protection Agency (EPA) has the authority to implement a United States Equal Employment Opportunity Commission (EEOC) award of attorney fees under federal antidiscrimination statutes. EPA has denied Mr. Owen F. Beeder's request for attorney fees on the basis that the EEOC has incorrectly interpreted its own regulations concerning attorney fees, since in Mr. Beeder's case there has not been a settlement agreement nor a finding of discrimination. EPA has requested a decision from this Office on the basis of our authority to determine the legality of expenditures of appropriated funds covering the award of attorney fees.

In Mr. Beeder's case, a final order was issued by the EEOC Office of Review and Appeals which directed EPA to pay Mr. Beeder's attorney fees. A further request was made by EPA to reopen and reconsider the EEOC decision under the provisions of 29 C.F.R. § 1613.235 (1988), which was denied by EEOC. Thus, the EEOC order became final. Corrective action ordered by the EEOC Office of Review and Appeals is mandatory and binding on the agency. 29 C.F.R. §§ 1613.234, 1613.237.

While we do not have the authority to review the merits of allegations of discrimination in employment in other agencies of the government, we have held that we may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints. *Albert D. Parker*, 64 Comp. Gen. 349, (1985); *Equal Employment Opportunity Commission*, 62 Comp. Gen. 239 (1983). Compliance with EPA's request in this case, however, would require us to render a decision on the propriety of a final order of the EEOC Office of Review and Appeals, not on an informal settlement. In view of the statutory authority vested in the EEOC under the provisions of 42 U.S.C. § 2000e-16 (1982) to order final corrective action in discrimination cases, we decline to question the propriety of EEOC's award of attorney fees in this case.

B-231992, December 15, 1989

Civilian Personnel

Relocation

- Relocation service contracts
- ■ Reimbursement
- ■ ■ Direct costs

Employee accepted use of relocation services contractor, but rejected contractor's offer to purchase his former home. Employee does not have to reimburse the agency for direct costs agency paid to contractor when the employee rejects the contractor's purchase offer. *Gerald F. Stangel, Larry D. King*, 68 Comp. Gen. 321 (1989).

Civilian Personnel

Relocation

- Residence transaction expenses
 - ■ Appraisal fees
 - ■ ■ Reimbursement
-

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Relocation service contracts
- ■ ■ Offers
- ■ ■ ■ Rejection

Agency paid relocation services contractor its direct costs for appraisals and title work. After employee rejected contractor's purchase offer, he also incurred expense for appraisal and title services. He may not be reimbursed for those expenses since they duplicate expenses agency paid to relocation services contractor. The Federal Travel Regulations in para. 2-12.5 (Supp. 11, Aug. 27, 1984) prohibit a dual benefit once an election is made to use a contractor.

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Reimbursement
- ■ ■ Eligibility

In the absence of any statutory or regulatory restriction, the amounts paid by an agency to a relocation services contractor on behalf of an employee under the provisions of 5 U.S.C. § 5724c are not considered in determining the maximum allowable reimbursement to the employee for his own expenses in selling his residence on the open market under § 5724a(a)(4).

Civilian Personnel

Relocation

- Residence transaction expenses
- ■ Relocation service contracts
- ■ ■ Use
- ■ ■ ■ Taxes

The FTR provides that the expenses paid by a relocation company providing relocation services on behalf of a transferred employee may be subject to a relocation income tax allowance to the extent such payments constitute income to the employee. Specific questions pertaining to the income tax consequences of such payments or to the applicability of the allowance should be addressed to the Internal Revenue Service.

Civilian Personnel

Travel

- Temporary duty
- ■ Return travel
- ■ ■ Amount determination

Agency is correct in its contention that employee was erroneously reimbursed for mileage for week-end return travel to any place other than his new headquarters. Such overpayments may be consid-

ered for waiver if they occurred after December 28, 1985, the effective date of the amendment to 5 U.S.C. § 5584 allowing waiver of travel expense overpayments.

Matter of: David B. Pidduck—Relocation Service Contract—Liability Upon Cancellation—Duplicate Costs—Taxability

This decision is in response to a request from an authorized certifying officer, Department of Energy, Bonneville Power Administration (BPA), Portland, Oregon,¹ concerning various issues pertaining to payments made to a relocation services contractor and to a transferred employee in connection with the sale of the employee's residence. In addition, we are asked to consider the legality of reimbursement to the employee for voluntary weekend travel to his former residence from temporary duty (TDY) locations after his transfer was effected. Finally, we are asked whether collection of any overpayments to the employee may be waived.

Background

The Department of Energy has entered into a relocation services contract under the provisions of 5 U.S.C. § 5724c (Supp. IV 1986) with the Howard Relocation Group in order to assist employees in selling their residences at their old duty stations when they receive permanent changes of station. Certain direct costs are incurred by the contractor such as appraisals, title work, and inspections, and they are billed to and reimbursed by BPA.

Mr. David B. Pidduck was authorized a permanent change of station from Pasco, Washington, to Snohomish, Washington, in July 1985. Mr. Pidduck initially chose to utilize the services offered by the Howard Relocation Group in order to sell his residence in Pasco. Mr. Pidduck later declined Howard's offer to purchase his former residence and instead sold it himself on the open market. Prior thereto, BPA paid the contractor for costs incurred of \$700 for appraisals and \$118.65 for title work. Later, BPA paid Mr. Pidduck \$300 for an appraisal and \$415.25 for title work.

The agency also made payments to Mr. Pidduck for weekend travel mileage from various TDY locations to his former residence in Pasco after he had already reported to his new duty station in Snohomish.

Opinion

Payments to Howard Relocation Group

The certifying officer says that prior decisions of the Comptroller General have disallowed reimbursement for costs incurred for unsuccessful attempts to sell residences. In this case Mr. Pidduck initially accepted the services of Howard

¹ Joanne Henry, Reference DSDT.

Relocation Group, but later declined Howard's offer to purchase his residence. Thus, a question arises as to whether the unconsummated transaction is analogous to an unsuccessful attempt to sell a residence which would require Mr. Pidduck to reimburse BPA for the amounts paid to Howard.

In our decision *Gerald F. Stangel, Larry D. King*, 68 Comp. Gen. 321 (1989), we held that BPA is obligated to pay all of the direct costs to the Howard Relocation Group under the terms of the contract without seeking reimbursement from the employee, so long as the transfer is in the interest of the government and is not primarily for the benefit of the employee. This decision applies to Mr. Pidduck and he does not have to reimburse BPA for any of the expenses paid to the Howard Relocation Group by BPA.

Duplicate Payments

The regulations implementing the statutory authority to enter into relocation service contracts in 5 U.S.C. § 5724c (Supp. IV 1986) are contained in Part 12 of Chapter 2, Federal Travel Regulations (FTR), FPMR 101-7, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1986). Paragraph 2-12.5 (Supp. II, Aug. 27, 1984) provides:

2-12.5 *Procedural requirements and controls.*

* * * * *

b. *Dual benefit prohibited.* Once an employee is offered, and decides to use, the services of a relocation company, reimbursement to the employee shall not be allowed for expenses authorized under Chapter 2, Parts 1 through 10, that are analogous or similar to expenses or the cost for services that the agency will pay for under the relocation service contract.

These governing regulations make clear that expenses similar or analogous to those paid to the relocation service company by an agency may not be reimbursed to the employee. *James T. Faith*, 67 Comp. Gen. 453 (1988); *Louis H. Schwartz*, B-231485, Jan. 19, 1989. Accordingly, Mr. Pidduck is not entitled to be reimbursed for the appraisal and title service costs² that he incurred after rejecting the contractor's offer.

The certifying officer also asks whether the amounts paid to the Howard Relocation Group and the employee can be compared and reimbursement to the employee made on the basis of the higher amount. We find no basis in the regulation for such a cost comparison. Rather, under the clear terms of the regulation, the employee is not liable for the payments to the relocation services contractor but is liable for the subsequent duplicate payments irrespective of the amounts involved. Therefore, the payments to Mr. Pidduck for appraisal and title services must be collected back in full.

Maximum Reimbursement

The certifying officer questions whether the maximum reimbursement allowed for the sale of a residence² as provided for by 5 U.S.C. § 5724a(a)(4)(B)(i) (Supp.

² Ten percent of the sale price or \$15,000, adjusted yearly, whichever is less.

IV 1986), should be computed on the basis of the combined total payments made to the Howard Relocation Group and to the employee. In this case the agency has paid the contractor directly for certain expenses under 5 U.S.C. § 5724c, and has also reimbursed Mr. Pidduck his sales expenses under 5 U.S.C. § 5724a(a)(4)(A). The combined total amount exceeds the 10 percent limitation.

The maximum reimbursement provision cited above expressly applies only to "reimbursement under this paragraph . . .," referring to reimbursement for expenses required to be paid by the employee. Likewise, section 5724c does not refer to the maximum reimbursement allowed under section 5724a(a)(4)(B)(i), nor does it refer to any other ceilings on payments under the contracts authorized by that section. Moreover, the General Services Administration has not provided for any ceiling on reimbursement when a relocation services contractor is used. See FTR Chapter 2, Part 12, cited above. Therefore, in the absence of any statutory or regulatory limitation, we conclude that the amounts paid to the Howard Relocation Group on behalf of the employee under the provisions of 5 U.S.C. § 5724c are not to be considered in determining the employee's maximum allowable reimbursement for the sale of his residence under 5 U.S.C. § 5724a(a)(4).

Relocation Income Tax Allowance

The certifying officer questions whether the allowable amounts paid to the Howard Relocation Group should be included in the computation of Mr. Pidduck's relocation income tax allowance.

The FTR, in para. 2-11.3i (Supp. 27, Jan. 1, 1988), states that the expenses paid by a relocation company providing relocation services to a transferred employee may be subject to a relocation income tax allowance to the extent such payments constitute income to the employee. However, we cannot answer the certifying officer's specific question because FTR, para. 2-12.7 (Supp. 11, Aug. 27, 1984), provides that questions as to the income tax consequences of payments to relocation companies should be addressed to the Internal Revenue Service.

Weekend Return Travel

The agency is correct in its determination that Mr. Pidduck was erroneously reimbursed following his transfer for mileage for weekend return travel to any place other than his new headquarters, but that he would be entitled to continuation of per diem during those weekends. *Michael K. Vessey*, B-214886, July 3, 1984. The net overpayment should be recovered from Mr. Pidduck. We understand that he has requested waiver of such amount. Waiver of erroneous travel payments is available under 5 U.S.C. § 5584, as amended by Public Law 99-224, 99 Stat. 1741-1742, December 28, 1985. However, waiver is only available with respect to erroneous travel payments made to an employee on or after December 28, 1985. Accordingly, if there were erroneous payments made to Mr. Pidduck on or after that date, they may be considered for waiver of repayment under the procedures outlined in 4 C.F.R. part 92 (1988).

Civilian Personnel

Compensation

■ **Retroactive compensation**

■ ■ **Eligibility**

■ ■ ■ **Adverse personnel actions**

■ ■ ■ ■ **Classification**

Where employees performed duties of a position classified at a higher grade than the position they occupied, no right to increased pay exists. A federal employee is entitled only to the salary of his/her appointed position even though higher level duties were performed. Moreover, collective bargaining agreement provision that provided higher pay where an employee is detailed to a higher-graded position for more than 30 days is not applicable, since there was no detail but merely an accretion or misassignment of some higher-graded duties. Therefore, the employees are not entitled to backpay for performing the higher-graded duties.

**Matter of: Cassandra G. McPeak and Wayne E. Dabney—Backpay—
Higher Grade Duty Assignment**

This action is in response to a request from the Defense Logistics Agency for an advance decision on the propriety of paying the backpay claims of Ms. Cassandra G. McPeak and Mr. Wayne E. Dabney based on their performance of the duties of a higher-graded position. For the reasons stated below, the claims are denied.

Background

Ms. McPeak and Mr. Dabney were assigned as Freight Rate Assistants, grade GS-6, during the period March 1, 1984, through June 13, 1987, at the Defense General Supply Center, Richmond, Virginia, where they worked in conjunction with Freight Rate Specialists, whose positions were graded at GS-7. The agency states that both Ms. McPeak and Mr. Dabney also performed duties of Freight Rate Specialists, GS-7. After a classification review, management elected not to upgrade the positions occupied by the claimants and stated that the claimants would only perform the duties of the grade GS-6 positions to which they had been assigned. The claimants filed a formal grievance dated May 27, 1987, alleging that they were still performing grade GS-7 work. As a result of this grievance, the agency acknowledged that the employees were in fact still performing duties at the grade GS-7 level, and issued a determination that effective June 15, 1987, Ms. McPeak and Mr. Dabney would only perform duties consistent with the GS-6 level of responsibility. The two employees claim backpay for the entire period of March 1, 1984, to June 12, 1987. The agency denied the claim, but asks whether it can grant both individuals backpay covering the period October 1, 1986, to June 12, 1987, since they were performing GS-7 level responsibilities during that period.

Opinion

The general rule is that an employee is entitled only to the salary of the position to which he is actually appointed, regardless of the duties performed. When an employee performs the duties of a higher grade level, no entitlement to the salary of the higher grade exists until such time as the individual is actually promoted. This rule was reaffirmed by the United States Supreme Court in *United States v. Testan*, 424 U.S. 392, at 406 (1976), where the Court stated that "... the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claim that he should have been placed in a higher grade." See also *Wilson v. United States*, 229 Ct. Cl. 510 (1981). Consequently, backpay is not available as a remedy for misassignments to higher level duties or improper classifications. *Regina Taylor*, B-192366, Oct. 4, 1978.

We have recognized an exception to this general rule where the parties to a collective bargaining agreement agree to make temporary promotions mandatory for details to higher grade positions, thereby establishing a nondiscretionary agency policy which would provide a basis for backpay. See *Beachley and Davis*, 61 Comp. Gen. 403 (1982), and *Albert W. Lurz*, 61 Comp. Gen. 492 (1982). In the present case the agency is a party to a collective bargaining agreement which provides that when an employee is to be detailed to a higher-graded position for more than 30 days, he or she shall be temporarily promoted. The agency asks whether this provision is sufficient authority to pay the employees backpay.

In this case there is no evidence of a detail of the employees to the higher-graded position. Instead, it appears that over a period of several years they either assumed or were assigned some duties which were associated with the higher-graded position. Thus, it appears that the situation here was one of misassignment or accretion of some higher-graded duties, not a detail to the higher-graded position.

Accordingly, since the claimants in this case were misassigned to perform some higher level duties, but were not detailed to a higher-graded position, there is no authority to award retroactive temporary promotions and backpay.

B-236552, December 18, 1989

Military Personnel

Pay

■ Retirement pay

■ ■ Amount determination

■ ■ ■ Post-retirement active duty

The retired pay of a service member who was immediately recalled to active duty without a break in service for less than 2 years is computed according to 10 U.S.C. § 1402 to reflect the additional service, and is based on the pay rate as prescribed in that statute.

Matter of: Colonel Wayne R. Ulisnik, USA (Retired)

This is in response to a request by Colonel Wayne R. Ulisnik, USA (Retired), for our review of the Army's computation of his retired pay. We find that the Army is using the correct method to compute his pay.

Colonel Ulisnik retired from the Army on November 30, 1983. He was immediately recalled to active duty without a break in service and served until June 30, 1986. Under 10 U.S.C. § 1402, which governs the recomputation of retired pay to reflect later active duty of persons who first became members before September 9, 1980, Colonel Ulisnik's retired pay presently is being computed using the pay rates that went into effect January 1, 1985. Because he experienced no break in service, Colonel Ulisnik maintains that he should be considered to have retired June 30, 1986, and that his pay should be computed under 10 U.S.C. § 1406, which prescribes that the retired pay base for someone who first became a member before September 9, 1980, is the rate of basic pay applicable on the retirement date. Colonel Ulisnik argues that the Army therefore should compute his retired pay using the pay rates that became effective October 1, 1985.

Colonel Ulisnik's retirement orders became effective November 30, 1983. The fact that he was immediately recalled to active duty does not mean that he had not officially retired on November 30 for retired pay purposes. *See* 65 Comp. Gen. 774 (1986). Provisions of law governing the recomputation of retired pay to reflect active duty after retirement are found in 10 U.S.C. § 1402. In fact, 10 U.S.C. § 1406, the provision that Colonel Ulisnik cites, states in subsection (a)(2) that recomputation for service after retirement is covered by 10 U.S.C. § 1402.

Under 10 U.S.C. § 1402(a), a recalled member who has been entitled to basic pay for a continuous period of 2 years at the rate of pay in effect when his recall ends is entitled to have his retired pay recomputed at that rate. If he has not served at that pay rate for 2 years, his retired pay is computed at the immediately preceding rate. In Colonel Ulisnik's case, that means that because he did not serve under the October 1, 1985, rate for 2 years, his retirement pay should be based on the rates of pay that became effective January 1, 1985.

Therefore, the Army is correct in computing Colonel Ulisnik's retired pay under 10 U.S.C. § 1402, using the rates of pay that became effective January 1, 1985.

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Necessary expenses rule
- ■ ■ Identification tags

An agency may use appropriated funds to purchase employee identification tags which, unlike calling or business cards, are not personal in nature and are reasonably necessary to the operations of the agency.

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Obligation

- Payments
- ■ Estimates
- ■ ■ Communications systems/services

Under 40 U.S.C. § 757 (1982), General Services Administration billings to the Navy only are required to approximate the cost of Federal Telecommunications System (FTS) service provided. The information provided this Office does not support a conclusion that GSA's billings were unreasonable approximations.

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- Payments
- ■ Termination costs
- ■ ■ Communications systems/services

The General Services Administration (GSA) is authorized to assess Navy with direct costs associated with Navy's withdrawal from FTS. Nothing in 40 U.S.C. § 757 (1982) requires GSA to recover such costs only through rates imposed on remaining FTS users.

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Civilian Personnel

Compensation

■ Discrimination allegation

■ ■ Attorney fees

■ ■ ■ GAO review

In view of the statutory authority vested in the Equal Employment Opportunity Commission (EEOC) to order final corrective action in discrimination cases, this Office declines to question the propriety of EEOC's award of attorney fees in this case.

87

■ Retroactive compensation

■ ■ Eligibility

■ ■ ■ Adverse personnel actions

■ ■ ■ ■ Classification

Where employees performed duties of a position classified at a higher grade than the position they occupied, no right to increased pay exists. A federal employee is entitled only to the salary of his/her appointed position even though higher level duties were performed. Moreover, collective bargaining agreement provision that provided higher pay where an employee is detailed to a higher-graded position for more than 30 days is not applicable, since there was no detail but merely an accretion or misassignment of some higher-graded duties. Therefore, the employees are not entitled to backpay for performing the higher-graded duties.

93

Relocation

■ Relocation service contracts

■ ■ Reimbursement

■ ■ ■ Direct costs

Employee accepted use of relocation services contractor, but rejected contractor's offer to purchase his former home. Employee does not have to reimburse the agency for direct costs agency paid to contractor when the employee rejects the contractor's purchase offer. *Gerald F. Stangel, Larry D. King*, 68 Comp. Gen. 321 (1989).

88

■ Residence transaction expenses

■ ■ Appraisal fees

■ ■ ■ Reimbursement

■ Residence transaction expenses

■ ■ Reimbursement

■ ■ ■ Eligibility

In the absence of any statutory or regulatory restriction, the amounts paid by an agency to a relocation services contractor on behalf of an employee under the provisions of 5 U.S.C. § 5724c are not

Civilian Personnel

considered in determining the maximum allowable reimbursement to the employee for his own expenses in selling his residence on the open market under § 5724a(a)(4).

89

- **Residence transaction expenses**
- ■ **Relocation service contracts**
- ■ ■ **Offers**
- ■ ■ ■ **Rejection**

Agency paid relocation services contractor its direct costs for appraisals and title work. After employee rejected contractor's purchase offer, he also incurred expense for appraisal and title services. He may not be reimbursed for those expenses since they duplicate expenses agency paid to relocation services contractor. The Federal Travel Regulations in para. 2-12.5 (Supp. 11, Aug. 27, 1984) prohibit a dual benefit once an election is made to use a contractor.

89

- **Residence transaction expenses**
- ■ **Relocation service contracts**
- ■ ■ **Use**
- ■ ■ ■ **Taxes**

The FTR provides that the expenses paid by a relocation company providing relocation services on behalf of a transferred employee may be subject to a relocation income tax allowance to the extent such payments constitute income to the employee. Specific questions pertaining to the income tax consequences of such payments or to the applicability of the allowance should be addressed to the Internal Revenue Service.

89

Travel

- **Temporary duty**
- ■ **Return travel**
- ■ ■ **Amount determination**

Agency is correct in its contention that employee was erroneously reimbursed for mileage for week-end return travel to any place other than his new headquarters. Such overpayments may be considered for waiver if they occurred after December 28, 1985, the effective date of the amendment to 5 U.S.C. § 5584 allowing waiver of travel expense overpayments.

89

Military Personnel

-
- Pay
 - Retirement pay
 - ■ Amount determination
 - ■ ■ Post-retirement active duty

The retired pay of a service member who was immediately recalled to active duty without a break in service for less than 2 years is computed according to 10 U.S.C. § 1402 to reflect the additional service, and is based on the pay rate as prescribed in that statute.

Procurement

Bid Protests

■ GAO procedures

■ ■ Preparation costs

Successful protester is entitled to recover company costs incurred in pursuing protest to the extent that such costs are sufficiently documented and are reasonable.

75

■ GAO procedures

■ ■ Preparation costs

■ ■ ■ Attorney fees

■ ■ ■ ■ Amount determination

Attorneys' fees claimed by prevailing protester are allowable where hours are adequately documented and the rates and hours claimed are shown to be reasonable.

75

■ GAO procedures

■ ■ Preparation costs

■ ■ ■ Attorney fees

■ ■ ■ ■ Amount determination

Attorneys' fees need not be allocated between sustained and denied protest issues where all of the issues raised by the protester were related to the same core protest allegation which was sustained, and there were no distinct and severable grounds of protest on which the protester did not prevail.

75

■ GAO procedures

■ ■ Protest timeliness

■ ■ ■ 10-day rule

■ ■ ■ ■ Reconsideration motions

Competitive Negotiation

■ Offers

■ ■ Preparation costs

Claim for proposal preparation costs is disallowed where claimant was not awarded proposal preparation costs in the protest decision and did not timely request reconsideration of the costs awarded.

75

Procurement

Contractor Qualification

- Approved sources
- ■ Alternatives
- ■ ■ Pre-qualification
- ■ ■ ■ Testing

Procuring agency properly rejected the protester's alternate item in a procurement involving a "Products Offered" clause where the protester refused to bear the costs of properly required qualification testing.

83

Noncompetitive Negotiation

- Industrial mobilization bases
- ■ Contract awards
- ■ ■ Propriety

Protest of contracting agency's proposed award of a contract for apparel to particular source to serve industrial mobilization purposes is denied where awardee's position would thereby be strengthened and protester was reasonably considered by contracting agency to be ineligible for award given its delinquent production status on current contracts.

72

Sealed Bidding

- Bids
- ■ Responsiveness
- ■ ■ Conflicting terms
- ■ ■ ■ Ambiguity

Where bid is submitted under name "Sigma Electronics" and bond is submitted under name "Sigma General Corporation" contracting officer properly rejected bid as nonresponsive because of uncertainty as to identity of the actual bidder and was not required to investigate further whether the named entities referred to same legal entity, since bidder bears primary responsibility for unambiguously identifying itself as the party to be bound by the bid and there was insufficient evidence in the bid documents to alert contracting officer that named entities might be the same legal entity.

86

- Contract awards
- ■ Propriety
- ■ ■ Invitations for bids
- ■ ■ ■ Amendments
- ■ ■ ■ ■ Acknowledgment
- ■ ■ ■ ■ Responsiveness

Protest against proposed award of a contract to a bidder that acknowledges an amendment containing a Procurement Integrity Certificate clause but fails to complete and sign the Certificate itself is

denied where bids were opened prior to December 1, 1989, but award has not been made, since the requirement for the Certificate, which implements section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988, has been suspended from December 1, 1989, to November 30, 1990, by section 507 of the Ethics Reform Act of 1989.